No. 2900

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a corporation, J. E. WOODS and M. J. CHAPPELL,

Plaintiffs in Error.

vs.

DAVID CLEMENT,

Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court of the District of Montana

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Counsel for Plaintiffs in Error.

Filed.....

.....Clerk.

BUTTE MINER COMPANY, PRINTERS.

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STATEMENT OF THE CASE.

A.—THE PLEADINGS.

David Clement, Jr., was killed while driving an enclosed milk wagon northward on Montana street in the City of Butte, Montana, in a collision with a Chicago, Milwaukee & Puget Sound Railway Company train. David Clement brought suit against the plaintiffs in error, defendants

below, to recover the profits which he alleged he lost by reason of his son's death.

The suit was brought under the doctrine of the last clear chance. The Court so instructed the jury. (Tr., page 99, line 10.)

The specific allegation of negligence is (Tr., page 4).

> " * * * the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk wagon * * * and was not observant of the approach of a train * * * that the said David Clement, Jr., was COMING DIRECTRY WITHIN THE WAY of the said approaching train; that the said engineer and the said Chappell did see the said David Clement, Jr., COMING DIRECTLY IN THE PATH of the said engine * * *"

Plaintiffs in Error deny all the material allegations of the complaint of defendant in error, except the allegations as to corporate existence, the collision resulting in the death of Clement, Jr., and the employment of the individual plaintiffs in error.

B.—THE EVIDENCE.

On many points the evidence is in accord. It is agreed that on the morning of the fatality Engineer Woods was moving a train of twelve loaded cars (Tr., p. 37, lines 6 and 7) weighing approximately 750 tons, to the B., A. & P. Ry. transfer. His engine was a standard switch engine with a coal oil lamp at each end (Tr., p. 39). Chappell, switch foreman, was standing on the foot board on the south side of the engine at the extreme west end; that some four or five hundred feet east of the crossing where

the accident happened the train came around a curve at a speed of about eight miles per hour. Shortly thereafter some breaking power was applied and the speed of the train perceptibly checked. At the time the train was approximately three hundred feet each from the crossing (Tr., p. 32) the milk wagon was one hundred seventy-five feet or thereabouts south of the crossing (Tr., p. 44). The wagon was approaching the crossing at the rate of four or five miles per hour (Tr., p. 32). From the time the wagon first came into sight no effort was made on the part of the driver to stop or check the team (Tr., p. 32). The team showed no evidence of fright (Tr., p. 70), but approached steadily at the same gate. There was no indication of any driver on the wagon (Tr., pages 43, 44, 58 and 68). All this according to the testimony of Chappell.

It is corroborated by the testimony of Woods who saw the rig one hundred seventy-five feet south of the crossing (Tr., p. 68) going at the rate of about five miles on hour and showing no symptom of nervousness (Tr., p. 70). He saw the boy at no time before the accident (Tr., p. 68).

Of these matters, there is no contradiction.

At a point about seventy-five feet from the crossing (Tr., p. 69) Engineer Woods applied the emergency break. The rails were then frosty (Tr., p. 67). Because of the service application which had been made coming around the curve a brief space prior the emergency did not work as well. The Court so instructed the jury, saying:

> " * * * he tells you, and others tell you the same thing, and there is no contradiction of that, that the emergency did not work as well at that time, because

> of the previous application of service air; all of the witnesses who testified on the point say the same thing. * * * "

(Tr., p. 104, lines 10-15.)

The testimony is uncontradicted that the team approached at a uniform rate of speed to the very point of the accident, and that the train, too, was still moving at the time of the collision. There was no diminution on the part of the milk wagon, and the speed of the train was not sufficiently diminished to enable the crew to bring the train to a stop until it had gone a considerable distance past the crossing.

The first time that Clement, Jr., was seen at all was by Chappell after the train had stopped (Tr., p. 41). He had seen no man up to that time (Tr., p. 43).

Woods first saw the boy when he got off the engine and went back to meet Chappell (Tr., p. 68). That was the first time he saw anybody (Tr., page 68).

David Clement testified that his son was one month under sixteen years of age (Tr., p. 28). That altogether during his lifetime his son had turned over to him the sum of $15.00 (Tr., p. 26, 28).

C.—VERDICT AND APPEAL.

At the conclusion of the taking of testimony plaintiffs in error sought a directed verdict upon other grounds also; but chiefly upon the grounds that the doctrine of the last clear chance did not apply to the case, but that the evidence made it conclusive that the negligence of the defendant in error and the negligence of the plaintiffs in error ad-

mitted by the pleadings and clearly established by the evidence were concurrent and active to the very instant of accident and to the very point of accident. The trial court said in denying the motion, that there was one question only, and that was, did the engineer do all he could to prevent the collision after he appreciated the danger (Tr., p. 94). It is the view of the trial court that there is no such doctrine as the doctrine of concurrent negligence. After argument and the instruction of the court, the jury returned a verdict in favor of the defendant in error for the sum of $2,500.00. Upon motion for a new trial the trial court made an order granting a new trial unless defendant in error remitted in writing $1,000.00 from the verdict (Tr., p. 23). This was done by the defendant in error (Tr., p. 113). Plaintiffs in error still feeling that the verdict was not justified by the evidence and feeling that the evidence clearly showed that the doctrine of the last clear chance did not avail the defendant in error, and that defendant in error's decedent was guilty of concurrent negligence which precluded defendant in error from recovering at all against the plaintiffs in error, filed their Bill of Exceptions, Assignment of Errors, and Petition for Writ of Error; and the order allowing the said Writ of Error to issue having been duly given and made (Tr., p. 124) thereafter in due time, and in the manner prescribed by law, and the rules of this Honorable Court, they have perfected their appeal to your Honors, and the writ of error brings the judgment of the United States District Court for the District of Montana in favor of the defendant in error, plaintiff below, and against the plaintiffs in

error, defendants below, before your Honors for review.

SPECIFICATIONS OF ERRORS.

1. The Court erred in overruling separate demurrers of defendants below (Tr., pages 8-11).

2. The Court erred in denying defendants' motion for directed verdict made on their behalf at the conclusion of the taking of testimony. (Tr., p. 89).

3. The Court erred in entering judgment upon the verdict for the plaintiff. (Tr., p. 17).

4. The Court erred in overruling the objection made by defendants to the question asked of plaintiff's witness, David Clement, on direct examination, in the following respect:

> "Q. Mr. Clement, what have you to say with reference to the boy, as to whether or not he was industrious, and so forth?
>
> "MR. FURMAN.—We object to that, on the ground it is unduly leading and suggestive; it doesn't appear necessary to lead or suggest to the witness the line of testimony desired.
>
> "THE COURT.—Well, it only points attention to what counsel means by disposition? Overruled, Isn't it admitted by the answer? Well, anyway. Proceed. The objection is overruled.
>
> "MR. FURMAN.—Exception.
>
> (2) "Q. What was the boy's—was anything said by the boy to you with reference to his going back to school?
>
> "MR. FURMAN.—Just a minute. We object to that on the ground that is hearsay, it is irrelevant.
>
> "The COURT.—Oh, it would have a tendency to show the possible or probable amount that the boy would have contributed to the father; I am not clear

whether it makes for the benefit of the plaintiff or the defendant; he may answer; the objection is overruled.

(Tr., p. 117).

5. The Court erred in sustaining plaintiff's objection to the question asked of the witness, James B. Glover, on cross examination, in the following respect:

"Q. Was that the first information that you had respecting him?

"MR. WHEELER.—We object to it as being irrelevant and immaterial, and incompetent, not tending to prove or disprove any issue. He says he first met him at the ranch.

"THE COURT.—I think so. Objection sustained.

"MR. FURMAN.—Exception.

(Tr., p. 117, 118.)

6. The Court erred in sustaining plaintiff's objection to the offer of proof to be made by plaintiff's witness, James B. Glover, on cross-examination, in the following respect:

"(Whereupon the following offer in writing was submitted.)

Defendant offers to prove by plaintiff's witness Glover, now on the stand, that he first heard of David Clement, Junior, when the said Clement was sleeping in a barn belonging to witnesses' brother-in-law, Al Congdon. That the said time was shortly prior to the time Clement, Jr., started working for witness."

"MR. WHEELER.—We object to the offer on the ground it is incompetent, irrelevant and immaterial, improper cross-examination, not proving or tending to prove any issue in the case.

"THE COURT.—Objection sustained.

"MR. FURMAN.—Exception.

(Tr., p. 118.)

7. The Court erred in sustaining plaintiff's objection to the question asked of defendants' witness W. G. Ward, on direct examination, in the following respect:

> "THE WITNESS.—My name is W. G. Ward. I knew David Clement, Jr., in his lifetime; I chummed with him. During the time he was at the Industrial School I went out to see him. I think the first or second Sunday after he was out there.
>
> "Q. Now, what if anything, did he say to you with respect to leaving his father's home?
>
> "MR. WHEELER.—Just a moment. We object to that as being irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.
>
> "THE COURT.—Sustained.
>
> "Mr. FURMAN.—Exception.

(Tr., p. 118-119.)

8. The Court erred in sustaining plaintiff's objection to the offer of proof made by the defendant, in the following respect:

> "MR. FURMAN.—May it please your Honor, we want to make an offer of proof. (Thereupon the following offer of proof, in writing, was submitted by counsel for the defendant:
>
> Defendants offer to prove by defendants' witness W. G. Ward, now on the stand, that David Clements, Jr., told him at the Industrial School, on the first or second Sunday after Clements, Jr., was committed there that his father, David Clements, had kicked him out of the house and would not permit him to live at home any longer."

"MR. WHEELER.—We object to it, on the ground and for the reason it is irrelevant, immaterial and incompetent, hearsay, not tending to prove or disprove any issue in the case.

"THE COURT.—Objection sustained.

"MR. FURMAN.—Exception.

(Tr., p. 119.)

9. The Court erred in sustaining plaintiff's objection to the offer of proof made by defendants of the commitment of David Clement, Jr., to the Industrial School, in the following respect:

"MR. FURMAN.—Now, we have an instrument we are going to offer in evidence. (The said instrument so offered in evidence is in words and figures as follows, to-wit:

"*In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

In the Matter of DAVE CLEMENTS, Alleged Juvenile Disorderly Person.

COMMITMENT.

Be it remembered that on the 3d day of May, 1912, a complaint was filed in the office of Justice of the Peace, Charles Foley, charging the above-named Dave Clemments, with being Juvenile Disorderly Person, and the same having been duly certified to and heard this day by this Court in the presence of said defendants, it is

ORDERED, ADJUDGED AND DECREED, That the said Dave Clemments *are* Juvenile Disorderly Person.

II. That said Dave Clemments, be, and *they are* hereby committed to the Industrial School, established in School District No. 1 in the City of Butte, Montana, until discharged according to law.

Done in open court this 3rd day of May, 1912.

(Court Seal) MICHAEL DONLAN,
Judge.

"MR. WHEELER.—We object to it on the ground and for the reason it is irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

"THE COURT.—Objection sustained. The matter was heretofore testified to orally.

"MR. FURMAN.—Exception. The defense rests.

(Tr., pages 119-121.)

ARGUMENT NO. 1.

THE COURT COMMITTED PREJUDICIAL ERROR IN RULING UPON THE ADMISSIBILITY OF EVIDENCE.

Defendant in error sought to prove that had David Clement, Jr., lived the profits which his father would have made from the time of his death until the boy became of legal age would have been large. To show that the boy's life would have been profitable rather than a liability, defendant in error was asked what the boy's disposition concerning going to school was. Counsel asked the defendant in error what the *boy had said* to him with reference to going back to school. There was objection by counsel for

plaintiffs in error. The Court could not anticipate, so he said, whether the answer would be beneficial to the defendant in error or the plaintiffs in error. Plaintiffs in error had no difficulty anticipating what the answer would be. Had the boy been inclined to go to school he would have been a drain upon his father rather than an asset, and even though the Court may have been surprised to hear that the boy said he did not want to go to school but wanted to work, the answer was no surprise to the plaintiffs in error. The admission of this testimony was clearly prejudicial to plaintiffs in error's rights. On the other hand, when the plaintiffs in error sought to prove by the witness, Ward, that David Clement, Jr., had told him while at the Industrial School that his father had kicked him (David Clement, Jr.), out of the house, the Court rejected the testimony. Plaintiffs in error respectfully urge upon your Honors that the defendant in error is here impaled upon one of the two horns of a dilemma. If the evidence adduced by the benetfi of the boy's statement to Clement, Sr., respecting going to school was material and proper, certainly the evidence of Ward to the effect that Clement, Sr., had kicked Clement, Jr., out of the house was material to the plaintiffs in error's case. It would enable the jury to form a conclusion as to the amount of money which Clement, Jr., would be apt to turn over to the father who had presumably treated him harshly if not unjustly. On the other hand, if this testimony which would be unfavorable to the defendant in error was not admissible, then certainly the testimony by Clement of the boy's statement was not admissible. Both statements fall in the same

class, and if one is admissible surely the other should be, and if one is inadmissible the other is likewise. The testimony of Ward being of the same character and the objection being made on the same grounds. The testimony sought to be introduced from Glover on cross examination is of slightly different character, and it may be that it was objectionable on the ground that it was not proper cross-examination. Objection was not, however, made upon that ground. If hearsay evidence is admissible at all it should be open equally to both sides. The jury were clearly entitled to say whether the committment of Clement, Jr., to the Industrial School showed him to be an industrious, good boy likely to be very profitable in case he lived. The best evidence, as we understand the law, of his committment would be the instrument itself.

Plaintiffs in error respectfully urge upon your Honors that in connection with these rulings error was committed which it is evident wrought to the detriment of plaintiffs in error in a most substantial manner and resulted in a verdict much too large under the circumstances.

ARGUMENT NO. 2.

THE VERDICT IS EXCESSIVE.

The verdict as it stood originally and as it stands at the present time is wholly unjustified by the evidence. Clement, Sr., testified his son gave him $15.00 on one occasion. (Tr., p. 26, 28.) He did not know what salary the boy was paid and gave no testimony which would justify a jury in drawing any conclusion at all with respect to the earning

capacity of the boy or the amount he would be liable to turn over to his father. The jury were left to conjecture and speculation on these important questions.

Glover testiefid that the boy had been in his employment for four months (Tr., p. 47). Under the testimony Clement, Jr., was turning over money to his father at the rate of $15.00 for four months, or $3.75 for one month. Lacking five years and one month of twenty-one, he would turn over to his father at the same rate $228.75. As the verdict stands it is approximately seven times that amount, and is, we shall respectfully submit, upon its face in view of the testimony exhorbitant and unjustifiable and shows the jury based its verdict upon sympathy—not evidence.

ARGUMENT NO. 3.

NEITHER THE PLEADINGS NOR THE EVIDENCE JUSTIFY THE RECOVERY BY THE DEFENDANT IN ERROR AGAINST THE PLAINTIFFS IN ERROR ON THE DOCTRINE OF THE LAST CLEAR CHANCE.

This case was tried on the theory that the complaint states a cause of action under the doctrine of the last clear chance. The Judge instructed the jury that that was the theory which the action was brought and tried (Tr., p. 99). It was that theory upon which it was permitted to go to the jury at all. Clement, Jr.'s, contributing negligence, which was definitely established by all of the testimony and uncontradicted by any of the testimony, would otherwise preclude a recovery.

It is the contention of plaintiffs in error that the complaint is not sufficient to state a cause of action in favor of the defendant in error and against the plaintiffs in error under that doctrine.

Your Honors will note that the pleading recites only that Clement, Jr., WAS COMING in the way of the train, and that plaintiffs in error saw him COMING in the path of the train. That is not sufficient. We take it that there is no doubt in any jurisdiction about the effect of contributing negligence. It defeats the right of recovery with the single exception sought to be plead in this case. That is, contributing neglect does not defeat a plaintiff's cause of action when the pleadings and the evidence show that after plaintiff's negligence takes him into a place of peril his said negligence becomes remote for the reason that he is discovered in a place of peril, and after that time the plaintiff being no longer negligent the defendant fails to exercise ordinary care to avoid injuring plaintiff or his property. Under such circumstances the contributing negligence of the plaintiff does not preclude his recovery against the defendant. The courts look with disfavor and scrutinize closely both pleadings and the testimony in all cases in which it is sought by plaintiff to avoid the consequences of his own negligence. That being true, the rules of the courts and the law of the land is clear and explicit, and these elements must be found, pleaded and proved before the plaintiff is permitted to recover.

The first element is the exposed condition brought about by the negligence of the plaintiff or the person injured.

The second, the actual discovery of the plaintiff or the person injured in the place of peril by the party sought to be charged. This discovery must be under such circumstances that the defendants in the action have an opportunity in which to exercise ordinary care to avert the accident, and the circumstances must be such that the primary negligence of the plaintiff becomes remote and inoperative.

Third, there must be a failure of the defendant after actual discovery and after the negligence of the plaintiff ceases to operate, to use ordinary care to avert the accident and damage.

The doctrine of the last clear chance is well established in Federal law and the particular incidents that attach to a proper application of the doctrine have been repeatedly specified. We call the attention of the court to the case of *Iowa Central Railway Co. v. Walker*, 203 Fed. 685. That case is on all fours with the proposition here urged, and we quote a considerable portion of the opinion in that case:

> " 'But, as I have already said to you, down to the time he was within the danger limit, in my judgment, there is nothing to be considered by you. Now, after he was within the danger limit, could he, by the exercise of diligence, have been seen by the engineer to be inside of the danger limit? Then, from that point, had this engineer exercised care and freedom from negligence, as he ought to do, could he then have averted the injury? If not, then your verdict will be in favor of the company. If he, the engineer, could have averted the injury after he saw the hazardous position in which the plaintiff had placed himself, then you will find a verdict for the plaintiff.'

"This instruction was faulty, in that it submitted to the jury the question as to whether or not, in the exercise of diligence on the part of the engineer, he could have discovered that the plaintiff was inside the danger limit. The instruction in that respect was excepted to by defendant.

"In Denver City Tramway Co. v. Cobb, 164 Fed. 41, 90 C. C. A. 459, Justice Van Devanter, then Judge Van Devanter, speaking with regard to the exception which permits plaintiff to recover, notwithstanding his own contributory negligence, said:

" 'The exception does not apply where the plaintiff's negligence or position of danger *is not discovered* by the defendant in time to avoid the injury.'

"In Hart v. Northern Pac. Ry. Co., 196 Fed. 180, 116 C. C. A. 12, this court asid:

" 'It presupposes or concedes the existence of contributory negligence, and seeks to avoid its consequence by subsequent occurrences. If it were true that Starr was in a state of actual peril, that the defendant *had actual knowledge* of that peril, and *after* that *knowledge was acquired* failed to exercise ordinary care to prevent injuring him, these facts might create a cause of action, or might excuse the contributory negligence which brought Starr into his position of peril.'

"Numerous other authorities might be cited to the same effect, to-wit, that the defendant's liability under what is known as the last clear chance doctrine is *only where, after actual discovery* of the plaintiff's perilous position the injury could be avoided by the exercise of ordinary care and diligence."

The Supreme Court of the State of Montana has passed upon the question of the doctrine of the last clear chance, and there is no conflict between the laws of this state and this rule of the Federal courts. The case of *Dahmer v. Northern Pacific Railway Co.*, 48 Mont. 152; 136 Pac. 1059,

was a case in which the Supreme Court was called upon to determine the law with relation to this doctrine. Mr. Chief Justice Brantly wrote the opinion of the court.

> "It may be remarked, however, that the rule is limited in its application to those cases only in which the plaintiff, or the person injured or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. (1 Thompson on Negligence, Sec. 228.) A case calling for its application embodies three elements, viz: (1) The exposed condition brought about by the negligence of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property, some other duty imposed by law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered." (And citations.)

It is common custom for plaintiffs to seek to avoid the consequences of contributing negligence by urging upon the courts that they should still be permitted to recover if defendants, or their servants, could avoid the consequences of plaintiff's negligence. So it was in the case of

> Dunworth vs. Grand Trunk Western Ry. Co., 127 Fed. 307.

In that case the Circuit Court of Appeals for the Seventh Circuit said about one who went upon the railroad track without taking sufficient precautions for his own safety.

> "Without necessity he deliberately placed himself in a situation of known danger. In the open space he would have been immune from danger, and with equal facilities for seeing in both directions. He had no right to stand upon the track. Taking the risk, the consequences should not be imposed upon another."
>
> "It is also said that the contributory negligence of the deceased should not prevent a recovery if the locomotive engineer, in the exercise of ordinary care, might have avoided the consequence of the deceased's negligence; * * * There are no facts disclosed in this record calling for the application of the modification of the rule. It does not appear that the presence of the deceased upon the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe. To bring the case within the modification of the rule it is incumbent upon the plaintiff to make a showing calling for its application. * * * "

It is not the contention of the plaintiffs in error that recovery should never be had under the doctrine of the last clear chance, but plaintiffs in error seriously do contend that the issue upon which the recovery is based must be full and complete, and the defendant in error signally failed to establish any of the necessary averments.

In the case of

Southern Ry. Co. vs. Carroll, 138 Fed. 638,

a traveler, who was familiar with a railroad crossing, just

as David Clement, Jr., was in this case, approached a crossing at night in his carriage which had drawn side curtains. He did not look or listen for the approach of a train which was in sight and hearing. He was driving along at a dog trot. He had crossed at that point several times in the day time. Under such circumstances, the Circuit Court of Appeals for the Fourth Circuit says that the law of the case is clear.

> "The traveler is required to give way to any train which is in sight or hearing * * *. * * * he must begin to look and listen at such distance from the track as to enable him to stop in case he hears an approaching train. * * * It is no excuse for failure to look and listen that the traveler did not think just then about the railroad, or its danger, or that his attention was diverted by some trivial matter. Schofield v. Chicago, etc., R. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224. 'Nor is it an excuse that the usual or statutory signals of approaching trains were not given.' "

Under the circumstances he was guilty of wilful and inexcusable negligence and under the circumstances the trial court should have directed a verdict for the defendant.

The case is similar in facts to the one under consideration by your Honors. It is quoted, not to show any application of the doctrine of the last clear chance, but to show that, in the opinion of the court, under the circumstances the negligence of the defendant was an immediate proximate cause of his injury. That being true, the doctrine of the last clear chance cannot be invoked to escape the rule, because the doctrine can be invoked only when some act of

the defendant transpiring subsequent to plaintiff's negligent acts makes the negligence of the plaintiff remote and not immediate.

Reasonable men can draw only one inference from the testimony in this case. That inference is, that the Clement boy was never in danger until he became upon the track of the defendant company. He could have stopped his team, which testimony shows were mild mannered and unafraid at the last instant of time, before he reached a place of danger, and thereby could have averted the accident and injury. Taking no steps to protect himself he drove upon the track immediately in front of the approaching locomotive, and the fact that the engineer SURMISED or CONJECTURED a brief instant before the accident that a dangerous situation would occur, is not SUFFICIENT SHOWING of DISCOVERY in a place of peril.

Powers vs. Iowa Cent. Ry. Co., 136 N. W. 1049

was a case brought on account of a crossing accident. Verdict and judgment were had for plaintiff, and on appeal to the Supreme Court of Iowa, the doctrine of the last clear chance was invoked. The testimony in this case showed that the train was running at a rate of speed prohibited by the town ordinance. Plaintiff had lived in the neighborhood for many years, was familiar with the crossing. He had an unobstructed view for a considerable distance. His horses approached the crossing at a trot, and when two or three rods from the crossing his team became startled, and so he could not look up to discover whether

a train was approaching or not. The engineer saw the plaintiff when he was eight or ten rods from the track, but the engineer

> " * * * had the right to suppose that plaintiff would exercise reasonable care and not drive on to the track ahead of the train, * * * "

Nevertheless, the plaintiff did drive on, a collision occurred, and the Supreme Court of Iowa says that the contention that the doctrine of the last clear chance should be applied here cannot be sustained, and the trial court should have directed a verdict for the defendant.

It is too plain to require argument that railway companies cannot be required to stop their trains every time they see travelers approaching the crossing. No citation of authority is required on this contention.

The engineer had a right to presume even until it was too late to avert the accident that the driver of the milk wagon would, as he so readily could have, stop his horses and permit the train to pass in safety. It is an every day experience of train crews to see men approaching, just as this team approached, and stop in close proximity to the crossing, but not in a place of peril; and the conjecture or surmise of the engineer that this team might not stop falls far short of an actual discovery in a place of peril. To be sure there was never a discovery of Clement, Jr., at all until after the accident had happened, and so far as the plaintiffs in error are concerned on this aspect of the case, the horses and wagon might have been proceeding along

the highway without a driver. If any presumption arises from the facts, it is a presumption that the engineer would be justified in believing there was no driver on board.

The language of

Boyd vs. Southern Ry. Co., 78 S. E. 548

is precisely in point here:

> "He was not in peril until he started to cross the track, and it was then too late for the engineer to have stopped his train or avoided injuring the plaintiff if he had been on the lookout and had seen the plaintiff's danger."

The plaintiff in this case does not allege a discovery in the place of peril. It alleges no more than that the train crew should have anticipated peril, a pleading which is not sufficient according to the authorities. It is not a condition of mind nor a conclusion from an inference that the doctrine of the last clear chance is based upon. It is based upon discovery, a physical condition of peril to plaintiff's decedent.

Bates vs. Louisville & N. R. Co., 64 So. 298,

was a case in which the doctrine of the last clear chance, or, as the Supreme Court of Alabama terms it, subsequent negligence, is very similar to the present case. Plaintiff was considered to be negligent, and if defendant was negligent at all, plaintiff urged that the jury might have found the engineer guilty of subsequent negligence in failing to

sand the track and thereby stop the train in time to avoid the accident. In that case the wagon in which plaintiff was riding was born a distance of one hundred feet. The evidence showed that a very few seconds elapsed, and the court held as a matter of law that the engineer had done all possible. They, therefore, refused to hold the doctrine of the last clear chance was applicable and affirmed the judgment of the trial court.

There is in this case an absolute failure on the part of the defendant in error to allege the discovery of Clement, Jr., in a place of peril, and the complaint goes no further than to allege that plaintiffs in error should have surmised or conjectured that the milk wagon would come into a place of peril, and the complaint, therefore, does not state a cause of action; and, moreover, all of the evidence shows that there never was a discovery of Clement, Jr., in a place of peril, and the proof, therefore, falls short of establishing liability under the doctrine. There was no danger until the team was actually upon the track. At any instant of time prior to the accident the team could have been stopped and the accident averted. Under such circumstances, there is no room for the application of the doctrine had it been sufficiently plead.

Wherever the doctrine of the last clear chance, the humanitarian doctrine, the doctrine of subsequent peril, or the doctrine of third degree negligence is recognized by the courts it is narrowly circumscribed. Man is primarily responsible for his own safety, and when he pleads or proves that his negligence has got him into trouble he will be permitted to recover only when he shows clearly that

his own negligence has become remote and another immediate, and the other injured him subsequent to the operation of his primary negligence. If his negligence is contemporaneous, concurrent and active both to the time and place of the accident there can be no recovery. The authorities cited so hold.

From the great wealth of additional authority on this point we shall quote but brief exhorts from a few.

Wise v. Cleveland, C., C. & St. L. Ry. Co., 103 N. E. 866,

Cites with approval

Indianapolis Traction, etc., Co. v. Croly, 96 N. E. 973,

"As we have heretofore said, the doctrine of last clear chance applies to cases only where the defendant's opportunity of preventing the injury by the exercise of due care was later in point of time than that of the plaintiff. This is a rule of universal application, and it affords the test of the applicability of the doctrine to a particular case. As a sort of corrollary to this rule, the courts have stated as a general proposition that, where the person injured has negligently exposed himself to the injury, he cannot recover on account of the negligence of the defendant by an application of the doctrine of last clear chance, unless it appears that the defendant's negligence intervened or continued after the negligence of the plaintiff ceased. Differently stated, the proposition is that, if the negligence of the injured party concurs with that of the defendant up to the very instant of the accident, or if it continues as long at least as the negligence

of the defendant, the doctrine cannot be properly applied against the defendant."

Denver City Tramway Co. v. Cobb, 164 Fed. 41,

This also rules that the case is within the exception to the general rule making contributory negligence a defense which is known as the last clear chance doctrine, but there are two reasons why that is not so.

First: The exception does not apply where there is no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury; second, where his negligence or position of danger is not discovered by the defendant in time to avoid the injury.

St. Louis & San Francisco Ry Co. v. Schumacher, 152 U. S. 77;

Illinois Central R. Co. v. Ackerman, 144 Fed. 959;

Missouri Pacific Ry. Co. v. Moseley, 57 Fed. 921;

Gilbert v. Erie R. Co., 97 Fed. 747;

United States Spruce Lumber Co. v. Shumate, Supreme Court of Appeals of Virginia, January 13, 1916, 87 S. E. 723,

says

"It appears clearly from the allegations of the fourth, and also from the allegations of each of the other counts of his declaration, that the plaintiff did

not exercise due care for his own safety in attempting to cross over the railroad track, and thereby was guilty of negligence, which negligence continued down to the moment of the accident and contributed to the injury to him, whereby the case made is one of concurring negligence, and he can have no recovery.

In the circumstances and under the conditions prevailing at the place of the accident, related in the declaration, the negligence of the plaintiff as well as that with which the defendant is charged, was continuous and practically instantaneous, covering only a short distance of space between the point at which the trainmen could see the plaintiff approaching the crossing and a still shorter distance from the point at which he could have seen the approaching car and engine had he looked, and the crossing; so that the doctrine of the 'last clear chance,' which is invoked throughout the declaration, could have no sort of application to the facts of the case. That doctrine presupposes an appreciable difference in time between the earlier negligence of the plaintiff and the latter negligence of the defendant, and it must appear that, in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by it by the exercise of ordinary care, it negligently failed to do something which it had a clear chance to do to avoid the accident. Real Estate Co. v. Gwyn, 113 Va. 337, 74 S. E. 208; Roanoke Ry. Co. v. Carroll, supra; Smith v. N. & P. Tr. Co., supra.

In this case it is a necessary conclusion from the facts alleged in the declaration and in each count thereof that the plaintiff was guilty of contributory negligence, simultaneous and concurrent with that of the defendant, and continuing up to the moment of the accident to him, and that the defendant could not have, by the exercise of ordinary care and diligence, saved him from the result; and therefore he fails to make by his declaration a case entitling him to recover

of the defendant damages for his injury."

State v. New York Ry. Co., 96 Atl., 809, Court of Appeals of Md., Feb. 9, 1916.

"It is clear to us that the last negligent act was the act of Cullen in attempting to cross the track in the manner in which he did, and the doctrine here sought to be applied is only applicable when the defendant's negligence in not avoiding the consequences of the plaintiff's or deceased's negligence is the last negligent act. It can never be invoked when the plaintiff's or the deceased's own act is the final negligent act."

Stephenson v. Parton, et al., Supreme Court of Washington, Feb. 17, 1916, 155 Pac., 147.

It is contended that the doctrine (of the last clear chance) does not apply where both parties are equally guilty of concurring acts of negligence, each of which at the very time when the injury occurred contributed to it. This no doubt is the rule.

Todd v. Cincinnati, N. O. & T. P. Ry. Co., Supreme Court of Tennessee, April 8, 1916, 185 S. W. 62,

where the acts of misconduct or negligence on the part of plaintiff and defendant are not successive but simultaneous, and in such cases where the act of plaintiff has not terminated as a casual factor, there should be no recovery; and also

" * * * nor may a plaintiff who is acting so recklessly as to be in utter disregard of his own safety be

heard to invoke the application of the principle above discussed," (the doctrine of the last clear chance).

This court says that it believes that an adult plaintiff cannot be found to have been allowed a recovery who went on to a railroad track under circumstances very similar to that of the case at bar. Other cases which throw some light on the doctrine of this application are:

Landis v. Interurban Ry. Co., Supreme Court of Iowa, May 14, 1914, 147 N. W. 318;

Gast v. N. P. Ry. Co., Supreme Court of North Dakota, May 28, 1914, 147 N. W. 793;

Whitesides v. C., B. & Q. Ry. Co., 172 S. W. 467;

Rollison v. Wabash Co., 160 S. W. 994;

Rosenberger v. Wells Fargo Co., 167 S. W. 433;

Johnston v. Delano, et al., Supreme Court of Nebraska, July 1, 1916, 158 N. W. 1034;

Duggan v. C., M. & So. P. Ry. Co., Supreme Court of Iowa, Sept. 23, 1916, 159 N. W. 228;

Scharf v. Spokane Co., Supreme Court of Washington, August 21, 1916, 159 Pac. 797,

which cites with approval 29 Cyc. 531. This rule (last clear chance) has no application if the negligence of the person injured and of defendant are concurrent, each of which at the very time the accident occurs contributes to it.

Plaintiffs in error therefore respectfully urge upon your Honors that the case at bar presented no facts for the determination of a jury, but the court should have given the binding instructions asked for, and the motion for a directed verdict was well founded on both law and fact and should have been sustained.

ARGUMENT NO. 4.

CLEMENT, JR., WAS GUILTY OF CONCURRENT NEGLIGENCE WHICH DEFEATS THIS CAUSE OF ACTION.

The testimony in this case at bar makes out a complete typical case of concurrent negligence. Clement, Jr., approaches the railroad crossing at a speed almost equal to that of the train itself. Both train and wagon are equally in view of each other. The train reaches the crossing with sufficient momentum to carry it a considerable distance. The team reaches the crossing jogging along at a very uniform rate absolutely unchecked. Clement, Jr., was never in danger until actually upon the track. Under such circumstances

Illinois Central Ry. Co. vs. Ackerman, 144 Fed. 959,

decided by the Circuit Court of Appeals of the Eighth Circuit is exactly in point. Plaintiff's intestate drove upon a street crossing over defendant's railroad track in front of a string of cars which were being backed. He was struck

and killed. He was well acquainted with the crossing. He could have seen along the tracks for a distance of several hundred feet, but yet he drove upon the tracks slowly and without stopping. The cars which ran him down were going from five to twelve miles an hour. The brakeman and fireman observed the wagon as it slowly approached the track. They supposed the driver would drive up close and stop, as was the custom. He did not stop and so was killed. It presented a case of negligence on the one side and contributing negligence on the other which would preclude a recovery, but the plaintiff was permitted to recover in the trial court on the theory that the railway company's employes having perceived that the deceased was about to drive upon the track, and was not using his sense of hearing, did not use reasonable or ordinary care to avoid the accident. That is to say, the trial court permitted the application of the doctrine of the last clear chance. The Circuit Court of Appeals of the Eighth Circuit says that there was no need of discussing the facts nor the law of last chance, for they said they were clear that in no admissible view was the doctrine to be applied to the case at bar. They did not see the deceased because the curtains of his wagon top were drawn, but even then the deceased could have observed the train for as great a distance as the men on the train could have observed his wagon. He failed in the duty imposed upon him by law, to look and listen before he went into danger, and

> "the men upon the train were not obliged under the circumstances to anticipate his negligence. They could very well have assumed either that he knew of

> the approach of the cars and intended to stop at the customary safe distance, or that he would look when near the track and then stop before going upon it."

The train crew could not know that the man was absent minded or inattentive.

> "He was not in a place of danger until it was too late to prevent the accident. The negligence of the employees of the railroad company and that of the deceased were CONCURRENT and CONTINUOUS down to the very moment of the collision, and there is no room for the contention that the negligence of the latter should be regarded as a known condition upon which the negligence of the former subsequently operated."

The request of the Railway Company for a directed verdict should therefore have been granted.

Again in

> Atchison, T. & S. F. Ry. Co. vs. Taylor, 196 Fed. 878,

the Circuit Court of Appeals for the Eighth Circuit holds in a case in which the contributory negligence would have been a plain defense for the company had the plaintiff not relied on the last chance rule.

> "The limitations of the last chance rule have been quite often defined by this court. It does not supplant or destroy the doctrine of contributory negligence, but is an exception or qualification, and depends upon special and particular conditions which must be made to appear. It presupposes negligence of the defend-

ant and contributory negligence on the part of the person injured and imposes liability if after perceiving the dangerous position in which the latter has negligently placed himself the injury might then have been avoided by the former by the exercise of reasonable care. It does not apply where there is no negligence of the defendant occurring after that of the person injured, or where the defendant does not discover his exposure to danger in time to prevent the accident. Illinois Central Railway Co. v. Ackerman, 76 C. C. A. 13, 144 Fed. 959; Denver City Tramway Co. v. Cobb, 90 C. C. A. 459, 164 Fed. 41; St. Louis & S. F. Railroad Co. v. Summers, 97 C. C. A. 328, 173 Fed. 358; Illinois Central Railway Co. v. Nelson, 97 C. C. A. 331, 173 Fed. 915. It must affirmatively be pleaded, if relied on. Hart, Adm'r. v. Railway, 196 Fed. 180, 115 C. C. A. (decided at the December term, 1911."

The Supreme Court of Vermont in

Labelle vs. Central Vermont R. Co., 88 Atl. 517,

said

"Should the case have been submitted to the jury upon the doctrine of the 'last clear chance'? The negligence of the plaintiff proximately contributing to the accident continued as long as it was possible for him to avoid personal injury. He was walking between the front wheels and the body of the dump cart, his horses perfectly manageable. The space between the forward wheels and the body was sufficient for cramping purposes, and there was no evidence tending to show that it was not large enough for the plaintiff to go through and outside the wheels, thereby to leave the team at any time before he went upon the track, if need be, for his safety. He could have

done this until the train was so near, according to the undisputed evidence, that it was no longer possiblt for those in charge to prevent a collision. Thus it appears that the plaintiff's negligence, proximate in character, was concurrent with that of the defendant (assuming that the defendant was negligent) as long as it was possible for the latter to avoid the accident. In this respect the case is not distinguishable from that of Flint's Admr. v. Central Vermont Ry. Co., cited above, and the doctrine of the 'last clear chance' does not apply. French v. Grand Trunk Ry. Co., 76 Vt. 441, 58 Atl. 722; Butler v. Rockland, etc., St. Ry. Co., 99 Me. 149, 58 Atl. 775; 105 Am. St. Rep. 267; Green v. Los Angeles Terminal R. Co., 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68.

Judgment affirmed."

In

Olson vs. Northern Pacific Ry. Co., 87 N. W., 843,

the Supreme Court of Minnesota said about a man who walked directly in front of a railway company train which had sounded the alarm three hundred feet from the point of accident and which gave no other signals, that the injured man could by the slightest movement of his head have discovered the hazard and by the slightest check in his movements have avoided the same; though plaintiff strenuously urged that the train crew could have discovered his peril in time to have saved his life, and pleading under the last clear chance, though not so termed in the opinion itself; that there was no evidence under the circumstances of conduct on the part of the train crew which would excuse the negligence of plaintiff's intestate.

Dyerson vs. Union Pacific R. Co., 87 Pac. 680; 7 L. R. A., N. S. 132,

is a very plain case with a very plain note on the doctrine of concurrent negligence. It is exactly in point and well reasoned. We get from head note No. 4 of the L. R. A.

> "Last clear chance—continuing contributory negligence.
>
> 4. A plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, cannot recover damages therefor, although the defendant ought to have discovered (but did not, in fact, discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort. (November 10, 1906.)"

The Supreme Court of Ohio says in

Drown vs. Northern Ohio Traction Co., 81 N. E. 326,

the doctrine of last clear chance does not apply where the plaintiff has been negligent and his negligence continues and concurrently with the negligence of the defendant directly contributes to produce the injury. It applies only where there is negligence of the defendant subsequent to and not contemporaneous with the negligence by the plaintiff, so that the negligence of the defendant is clearly the

proximate cause of the plaintiff's injury not the remote cause.

Bruggeman vs. Illinois Central Ry. Co., 123 N. W. 1007,

is a case in which the Supreme Court of Iowa had under consideration the last clear chance doctrine. They said if both plaintiff and defendant could have prevented the accident but neglected to do so their negligence was concurrent and the last clear chance doctrine does not apply.

> "There is a general agreement in the authorities that, where an engineer actually sees a person in a position of danger, and then fails to do what he reasonably can to prevent an accident, the railroad company is held responsible for the resulting injury, irrespective of the question of contributory negligence. If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. IF, HOWEVER, EACH HAD SUCH POWER, AND EACH NEGLECTED TO USE IT, THEN THEIR NEGLIGENCE WAS CONCURRENT, AND NEITHER CAN RECOVER AGAINST THE OTHER."

So then in this case, taking the view most favorable to the plaintiff, the best that can be said for him is that his negligence concurred with defendants'.

The Supreme Court of California has given great attention to the application of the doctrine of the last clear chance, and to the doctrine of concurrent negligence. In the case of

Green vs. Los Angeles Terminal Ry. Co., 76 Pac. 719,

the court considered a state of circumstances quite similar to those of the case at bar, and concluded that

> "4. The doctrine of last clear chance applies in cases where defendant, knowing of plaintiff's danger, and that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury, but has no application to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it."

The doctrine of last clear chance applies in cases where defendant, knowing of plaintiff's danger, and that he cannot extract himself from it, fails to do something which it is in his power to do to avoid the danger. It has no application, however, to a case where both parties are guilty of concurrent negligence, each of which, at the very time when the accident occurs, contributes to it. In the Green case on a motion for re-hearing on the original opinion in the case making the company responsible for any damages, the rule quoted was reached. The opinion both on the original hearing and on the rehearing is long and closely reasoned. It would be impracticable to quote further than the headnote unless we elected to quote the entire opinion, which is readily available to your Honors, and which fully sustains the rule as announced in the note cited.

The Supreme Court of Kansas in the case of

Coleman vs. Atchison, T. & S. F. R. Co., 123 Pac. 756,

denied a recovery under the last clear chance, saying:

> "The plaintiff and the driver negligently failed to look for an approaching train, when, if they had looked after passing by the obstructing box cars, they could have seen the cars coming from the west in time to have stopped the team and avoided the collision. The conductor, had he kept a proper lookout, might have seen them and stopped his train, and should have done so if they appeared to be heedless of its approach, and in that situation was negligent in failing to keep a proper lookout. The two men were also negligent in failing to look for a train after passing the end of the box cars on the side track. The collision then was the immediate result of the concurring negligence of both parties.
>
> In Dyerson v. Railroad Co., 74 Kan. 528, 87 Pac. 680, it was said in the opinion: 'The test is, what wrongful conduct occasioning an injury was in operation at the very moment it occurred or became inevitable? If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent, and neither can recover against the other.' "

The doctrine of concurrent negligence is not new to jurisprudence. Among the older cases one of the best reasoned is

O'Brien vs. McGlinchy, Supreme Court of Maine Reports, 4 Pulsifer, 552.

The case holds that for the doctrine of the last clear chance to be applicable the negligence of defendant and plaintiff should not operate conjunctively. In cases where the negligent acts of the parties are distinct and independent, and the act of the plaintiff preceeds that of the defendant it is considered that plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been averted by the other. The ancient English cases are cited in support of that contention, which we urge is still the law. However, the court had this to say:

> "But this principle should not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness the plaintiff is injured; nor where the negligent act of the defendant takes place first and the negligence of the plaintiff operates as an intervening cause between it and the injury."

And the court says there may be other exceptions to the last clear chance rule. The case at bar falls clearly within the view of this old Maine case, that no recovery can be had under the doctrine of the last clear chance, but is a typical case of concurrent negligence.

C. & O. Ry. Co. v. Saunders' Adm'r., 83 S. E. 374,

where a young man who is in possesion of his normal faculties got in front of a train at a public pathway without looking, and who walked down the track without looking back, was killed by a train which had been in plain sight

for a considerable distance, but whose crew was negligent in not discovering the danger. There was MUTUAL and CONCURRENT negligence which continued up to the very moment of the accident, and recovery could not be had under such circumstances. The duty of each being equal, and each being equally guilty of a breach of the duty.

Norfolk Southern Ry. Co. v. White's Adm'x., Supreme Court of Appeals of Virginia, 84 S. E. 646,

cites with approval and as binding authority the case of

Real Estate, Etc., Co. v. Gwyn, 74 S. E. 208.

> "It must appear that in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by him by the exercise of ordinary care, he negligently failed to do something which he had a clear chance to do to avoid the accident. The doctrine can have no application to a case where the negligence of both plaintiff and defendant is simultaneous and concurrent."

Ryan v. Union Pacific R. Co., 151 Pac. 71,

says

> " * * * we are committed to the rule that the doctrine (of the last clear chance), in a proper case, is also applicable where the perilous situation of the party injured could or ought to have been discoveerd, but, because the assumed negligence of both parties was, in such respect ACTIVE, CONCURRING, COMBINING and CONTRIBUTING at the very

> time of the impact, and the one as direct and proximate as the other; * * * then the negligence of both was actice and concurring up to the very time of the impact, and the collision the result of the combined and concurring negligence of both, and the one as direct and proximate as the other."

Under such circumstances recovery is denied under the doctrine of the last clear chance.

> Gilbert v. Missouri Pacific Ry. Co., 139 Pac. 380,

says the plaintiff was engaged in an active disregard of his own safety up to the last moment when he might have been saved, and consequently has no standing to invoke the doctrine of the last clear chance.

> Wabash Ry. Co. v. Tippecanoe Loan & Trust Co., 98 N. E. 64,

says there is here no room for the application of the doctrine of last clear chance, for decedent had the power, down to the last instant, to avoid the injury, and quotes

> Evans v. Adams Express Co., 23 N. E. 1039,

which uses this language:

> "Where the negligence of two persons is contemporaneous, and the fault of each operated directly to

> cause the injury, the rule deducible from the authorities is that the plaintiff cannot recover, if by the exercise of ordinary care on his part he might have avoided the injurious results of defendant's negligence."

It cites a long list of cases in support of the rule.

> Consumers' Brewing Co. v. Doyle's Adm'x., 46 S. E. 390,

holds that plaintiff cannot recover if guilty of continuing and concurrent negligence which operated at the same time and until the very point of time or instant with the negligence of the defendant.

> Southern Ry. Co. v. Bailey, 67 S. E. 365,

is a strong case for plaintiffs in error. It holds that when an engineer sees a man on a railroad track it is not necessarily a discovery in places of peril, since the man on the track, if in possession of his faculties, may avoid injury by using ordinary care to discover the approach of the engine. It is only when those in charge of a train discover that the one on the track is unconscious of his danger or helpless that it becomes their duty to seek to save him from damage.

In the case at bar there was no discovery of Clement, Jr., at all upon the track, nor was it made apparent at any time when a collision could have been avoided, that Clement, Jr., would not stop and himself avert the accident.

In the Bailey case a drayman stood on a cement sidewalk so close to a track that he was struck by a portion of an engine which was approaching at the rate of five or six miles an hour. The drayman could have seen the engine approaching for a distance of a thousand feet. On the other hand, the engineer saw the drayman but made no effort to stop the train. The court held that the negligence of the drayman continued right up to the time and place of the accident, and in spite of the negligence of the engineer, the doctrine of last clear chance did not apply because the drayman being apparently in possession of his faculties could have stepped back and escaped the injury at any time; and, hence all the facts made out a clear case of concurrent negligence for which there can be no recovery. The duty of the parties was equal, and each was equally guilty of its breach.

And so, we respectfully urge upon your Honors, that David Clement, Jr., and plaintiffs in error were equally chargeable with the duty of avoiding the accident which was so fateful to Clement, Jr., and under the facts it is incontrovertibly true that each was equally guilty of a breach of its duty, if your Honors agree with the jury that plaintiffs in error's servants were negligent at all.

WHEREFORE, plaintiffs in error respectfully urge upon your Honors that the complaint does not state a cause of action under the last clear chance doctrine; that the evidence fails to prove the doctrine of the last clear chance; and that the David Clement, Jr., was guilty of concurrent negligence which precluded a recovery by the

defendants in error. We therefore submit that the judgment should be reversed.

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Service of the above and foregoing Brief is hereby acknowledged, and copy thereof received, this 13th day of February, 1917.

B K. Wheeler

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